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**IMPAIRMENT ANALYSIS OF
ENTERPRISE MARKET LOOP
FACILITIES**

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**PUBLIC UTILITY COMMISSION
OF TEXAS**

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PUBLIC UTILITY COMMISSION
FILING CLERK

PRELIMINARY ORDER

This proceeding was established at the direction of the Public Utility Commission of Texas to determine whether carriers competing for enterprise-market customers are impaired without access to unbundled enterprise-market loop facilities pursuant to the Federal Communication Commission's (FCC) Triennial Review Order (TRO).¹

I. Background

In its Triennial Review Order (TRO), the Federal Communications Commission (FCC) found on a national basis that requesting carriers "are impaired at most customer locations without access to dark fiber loops,"² "are impaired on a customer-location-specific basis without access to unbundled DS3 loops,"³ and "generally are impaired without access to DS1 loops."⁴ The FCC also decided, however, to delegate to state commissions "a fact-finding role to identify where competing carriers are not impaired without unbundled high-capacity loops pursuant to two triggers," and if no impairment is found, to adopt a transition schedule.⁵ State commissions

¹ See *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, *Report and Order on Remand and Further Notice of Proposed Rulemaking* (rel. Aug. 21, 2003) (TRO).

² *Id.* ¶ 311.

³ *Id.* ¶ 320.

⁴ *Id.* ¶ 325.

⁵ *Id.* ¶ 328.

have nine months from the effective date of the TRO to conduct the initial review.⁶ The review is to apply the self-provisioning trigger and the competitive-wholesale-facilities trigger,⁷ and, if needed, an evaluation of additional factors if the self-provisioning trigger is not facially satisfied.⁸ Further, if the state commission believes impairment exists for a particular location even though a trigger is satisfied, it may petition the FCC for a waiver to maintain existing unbundling obligations.⁹ The review is to be conducted on a customer-by-customer location basis, including multiunit customer locations, for a specific loop capacity level.¹⁰

The requirements in the TRO became effective on October 2, 2003, 30 days after publication¹¹ of the TRO in the *Federal Register*.¹² Accordingly, the Commission must complete its initial review and, if it chooses to do so, must petition the FCC to maintain unbundling requirements at specific locations by July 2, 2004.

II. Procedural History

On October 15, 2003, the Commission administrative law judge (ALJ) in Order No. 1 established October 20, 2003 as the deadline for interested parties to intervene in this proceeding and also required intervenors to file a list of issues.

A notice of intervention was filed by Covad Communications Company on October 17, 2003. On October 20, 2003, Southwestern Bell Telephone Company, L.P. d/b/a SBC Texas;

⁶ See *Id.* ¶ 339.

⁷ See *Id.* ¶ 329.

⁸ See *Id.* ¶ 335.

⁹ See *Id.* ¶ 336.

¹⁰ See *Id.* ¶¶ 328, 332, 337.

¹¹ See 68 Fed. Reg. 52276-52306 (Sept. 2, 2003) (to be codified at 47 C.F.R. pt. 51).

Verizon Southwest Inc.; the Office of Public Utility Counsel (OPC); MCImetro Access Transmission Services, LLC, MCI WorldCom Communications, Inc. and Brooks Fiber Communications of Texas, Inc. (collectively referred to as MCI); Birch Telecom of Texas, LTD, LLP, Cbeyond Communications, L.P., Focal Communications Corporation of Texas, GlobalCrossing Local Services, Inc., KMC Telecom III, LLC, XO Texas Inc., and Xspedius Communications, LLC (collectively CLEC Loop/Transport Coalition); Western Communications, Inc. d/b/a Logix Communications; and McLeodUSA Telecommunications Services, Inc. filed their respective notices of intervention. TEXALTEL filed its motion to intervene on October 21, 2003. Moreover, conditional motions to intervene were filed by Texas.Net, Inc.; United Telephone Company of Texas, d/b/a Sprint, Central Telephone Company of Texas, d/b/a Sprint and Sprint Communications Company L.P.; El Paso Networks, LLC; the State of Texas, by and through the Office of the Attorney General of Texas; and AT&T Communications of Texas, L.P., TCG Dallas and Teleport Communications Houston, Inc. (collectively "AT&T").

Lists of issues were submitted by Covad, the State of Texas, through the Office of the Attorney General of Texas, Texas.Net, SBC Texas, Verizon Southwest, Sprint, El Paso Networks, MCI, the CLEC Loop/Transport Coalition, AT&T, and McLeodUSA.

III. Jurisdiction

In Order No. 1, the Commission ALJ ruled that the Commission is acting under the federal authority granted to the FCC pursuant to section 251(d)(2) of the Federal Communications Act that the FCC has delegated to the states to conduct analyses in accordance with federal guidelines.¹² This market-specific analysis performed by this Commission will allow the FCC to properly determine the degree of unbundling of network elements required

¹² See TRO ¶ 830.

¹³ See Order No. 1 at 3 (Oct. 15, 2003)

under section 251(d)(2) of the Act.¹⁴ The Commission adopts the ALJ's ruling that, in conducting this proceeding, the Commission is acting in part under federal authority delegated to it by the FCC. The Commission notes, however, that it has authority under state law to investigate competition in the telecommunications industry.¹⁵

IV. Nature of Proceeding

In delegating authority to the states to make certain market and impairment determinations, the FCC specified factors that must be considered and certain parameters regarding the analyses leading to those determinations, set some deadlines, and established some procedures to challenge state action or inaction. Other than these areas, the FCC did not specify any procedures that must be followed.

In this proceeding, the Commission will investigate competition in specific telecommunications markets, and evaluate facts related to the competitiveness of specific markets within the framework specified by the FCC. This detailed analysis is necessary to properly determine the degree of unbundling of network elements required under federal law.¹⁶ Consequently, the Commission concludes that this investigatory proceeding is not a contested case or rulemaking as defined by the Texas Administrative Procedure Act.¹⁷ Further, the Commission is not acting under a petition for arbitration or a complaint regarding any existing interconnection agreement. Even though the results of this proceeding may ultimately appear in interconnection agreements, the Commission concludes that this proceeding is not an arbitration of an interconnection agreement or a resolution of a post-interconnection dispute. Consequently, the Commission has some discretion in deciding how this proceeding should be conducted.

¹⁴ See TRO ¶¶ 184, 186-90.

¹⁵ See PURA §§ 52.054-055, 52.104, 52.205, 60.021-22.

¹⁶ *Id.* ¶¶ 184, 186-90.

¹⁷ See TEX. GOV'T CODE ANN. § 2001.003 (Vernon 2000).

Due to the nature of the issues involved and the timelines faced under the TRO, the Commission concludes that this investigation should be conducted through a contested proceeding that generally follows the Commission's procedural rules for contested matters, but the Commission cannot conclusively determine at this time for this unique proceeding where it may deviate from these rules. The Commission does decide, however, that *ex parte* prohibitions shall apply, and that interested parties may conduct discovery and avail themselves of the Commission's authority to compel the attendance of witnesses and the production of documents.

Parties shall present factual information to the Commission by sworn evidence, and opposing parties will be allowed to challenge that evidence both by cross examination and by presenting controverting evidence. Parties to this proceeding will be required, however, to bring forth all information in their custody and control that would inform the Commission on issues it must address in this proceeding. In section V of this Order, the Commission identifies specific information for which parties must present evidence, either through testimony or by documents supported by appropriate testimony.

In addition, the Commission tentatively decides that the parties may make oral closing arguments in lieu of post-hearing briefs. Because the Commission is hearing this matter, no proposal for decision will be prepared and exceptions and replies are not necessary. Also, due to the nature of this proceeding, the timelines, and the opportunity for recourse to the FCC, motions for rehearing are not required. Motions for reconsideration may be allowed, or the Commission may issue preliminary findings and allow comment by the parties. The Commission or its ALJ will issue further orders regarding procedures to be followed in this matter.

V. Structure of this Proceeding

In this proceeding, the Commission will conduct impairment analyses for particular customer locations¹⁸ to determine whether competing carriers are not impaired without access to

¹⁸ See TRO ¶ 328.

unbundled high-capacity loops.¹⁹ The Commission will first apply the self-provisioning trigger and the competitive wholesale facilities trigger to determine whether any particular customer location is not impaired for a specified loop capacity level.²⁰ For those locations where the self-provisioning trigger is met for a specific level of loop capacity, the Commission will determine whether there are barriers to further deployment of competitive facilities at that location even though the trigger is met.²¹ If neither trigger is met for a particular location for DS3 loops capacity, or if the self-provisioning trigger is not met for dark fiber loops, the Commission will analyze the potential deployment of competitive loop facilities using eight economic factors set by the FCC to determine whether it is economical to deploy competitive loop facilities.²² The specifics of these analyses are discussed in some detail below.

In Order No. 1, intervenors were directed to state whether they would argue that there are specific customer locations in Texas where competitive carriers are or are not impaired without unbundled access to a specific loop capacity level to serve enterprise customers.²³ While there are various reasons why a party might allege non-impairment as to a given customer location, only two ILECs, SBC Texas and Verizon, have indicated an intention to do so. Pursuant to Order No. 4, SBC Texas and Verizon were directed to initially identify each customer location and loop capacity level for which they will assert there is no impairment, and the initial detailed basis for their assertion of no impairment.²⁴

A. Self-Provisioning Trigger and Competitive Wholesale Facilities Trigger

The Commission must use the two triggers identified by the FCC as the principal

¹⁹ *See Id.*

²⁰ *See Id.* ¶¶ 328-29, 332-34, 337.

²¹ *See Id.* ¶ 336.

²² *See Id.* ¶ 335.

²³ *See* Order No. 1 at 3.

²⁴ *See* Order No. 4 at 2 (Oct. 31, 2003).

mechanism in evaluating whether requesting carriers are not impaired at a particular customer location. The self-provisioning trigger will be applied only to DS3 loops and dark fiber loops; the competitive wholesale facilities trigger will be applied only to DS1 and DS3 loops. If the self-provisioning trigger is met, it is not necessary to apply the competitive wholesale facilities trigger.²⁵

1. Self-Provisioning Trigger and Competitive Wholesale Facilities Trigger

The self-provisioning trigger for DS3 loops is met when two or more unaffiliated competing carriers, including intermodal providers of comparable service, are serving enterprise loop customers at a particular customer location with their own DS3 loop facilities. These facilities include dark fiber obtained under a long-term indefeasible right of use that has been activated by the competing carriers' own optronics and are used to serve a customer at that location. For dark fiber, the trigger is met if two or more unaffiliated competing carriers have deployed their own dark fiber at a specific customer location. If this trigger is met, the Commission must find that there is no impairment at that location.²⁶ The self-provisioning trigger will not be considered when evaluating impairment for DS1 level loops.²⁷

In this proceeding, SBC Texas and Verizon must show that the self-provisioning trigger is met at each customer location that it seeks to challenge the FCC's national finding on the basis of self provisioning. To make this showing, an ILEC must demonstrate for each customer location that the requisite number of competitive providers exists, that the providers are not affiliated with each other or with the ILEC, and that the providers offer the necessary service. An ILEC may rely upon information provided by any other party in making this showing.

Every competitive provider participating in this proceeding shall present evidence to identify, for each customer location and loop capacity level initially identified by the SBC Texas

²⁵ See TRO ¶ 332.

²⁶ See *Id.*

²⁷ See *Id.* ¶327.

or Verizon, all loop transmission facilities with the same capacity level and whether the loop transmission facilities are self-provisioned or provided by a third party. Competitive providers shall also present evidence to identify all of its affiliates that provide loop transmission facilities at that capacity level at that location.

2. Competitive Wholesale Facilities Trigger

The wholesale facilities trigger is met for DS1 and DS3 when two or more unaffiliated competing carriers, including intermodal providers of comparable service, have deployed transmission facilities to a particular location and are offering alternative loop facilities to competitive LECs on a wholesale basis at the specified capacity level.²⁸ If this trigger is met, the Commission must find competing carriers are not impaired at that particular location.²⁹

In this proceeding, SBC Texas and Verizon must show that either the self-provisioning trigger or the competitive wholesale facilities trigger is met in each customer location that it seeks to challenge the FCC's national finding. To make this showing, an ILEC must demonstrate for each customer location that the requisite number of competitive providers exists, that the providers are not affiliated with each other or with the ILEC, and that the providers offer the necessary service. An ILEC may rely upon information provided by any other party in making this showing.

Every competitive provider participating in this proceeding shall identify for each customer location initially identified by the ILEC, all loop transmission facilities with the same capacity level, and whether the loop transmission facilities are self-provisioned or provided by a third party. Competitive providers shall also identify, in each ILEC identified customer location, all of its affiliates that provide loop transmission facilities at that capacity level.

²⁸ See *Id.* ¶337.

²⁹ See *Id.*

B. Exceptional Sources of Impairment

If the self-provisioning trigger is met for DS3 loops at any customer location, or for dark fiber loops at any customer location, the parties will be allowed to show the existence of barriers to further deployment of competitive facilities at that location.³⁰ If such barriers exist, the Commission must determine whether requesting carriers are still impaired, and if the Commission finds continuing impairment, it may petition the FCC for a waiver to maintain the ILEC's unbundling obligation at that location.³¹

The Commission concludes that competitive providers have the self-interest and knowledge of such barriers that allow them to identify those locations that the Commission should evaluate for impairment. Accordingly, in this proceeding, competing carriers must present evidence to identify those customer locations where these significant barriers to entry exist, identify the barriers, and show why such barriers prevent further entry into the market.

C. Analysis of Potential Deployment

In those customer locations where neither of the triggers discussed in section V.A. are met for DS3 or dark fiber, the Commission must conduct further analysis to address the potential ability of competitive providers to deploy their own loop transmission facilities to serve the enterprise market.³² In this analysis, the Commission must consider competitive providers use of their own loop transmission facilities to serve the enterprise markets, and operational and economic barriers.

The Commission must consider the potential role of operational barriers, such as construction delays encountered by the ILECs, difficulties in obtaining building access for multiunit premises, and difficulties encountered in gaining access to right-of-ways and permits from local and municipal authorities. The Commission must also examine whether economic

³⁰ See *Id.* ¶336.

³¹ See *Id.*

factors associated with the use of competitive loop transmission facilities are preventing entry into the enterprise market, and if not, whether requesting carriers are not impaired without access to unbundled local DS3, or dark fiber loops for a particular customer location.³³

When conducting this examination, the Commission must consider nine factors specified by the FCC.³⁴ In a more general sense, the Commission must determine whether expected revenues from deployed facilities will be sufficient to cover operating expenses, provide a recovery of invested costs in a reasonable amount of time, and provide a reasonable return on investment. Ultimately, the Commission must determine whether there are material barriers at a customer location that would preclude competitive providers from economically deploying loop transmission facilities at that location.³⁵

In this proceeding, competitive providers participating in this proceeding shall, at each customer location that does not meet the applicable triggers, provide evidence that details their experiences regarding construction delays, obtaining building access, obtaining right-of-ways and permits, and any other circumstances that operationally impair the deployment of loop facilities.

Parties shall also present evidence regarding potential revenues likely to be available and all potential costs likely to be incurred by a competing carrier at a given customer location. Further, parties shall present evidence regarding revenue commitments, associated with short or long term service agreements, relative to the recovery of sunk construction costs of the underlying loop, including laying the fiber and attaching the requisite optronics to light the fiber. These revenues shall include revenues a competitor is likely to obtain from using its facilities for providing data and voice services. Similarly, parties shall present evidence on all factors affecting cost faced by a competitor providing local exchange service to the enterprise market. Parties shall address the impact on these costs of an entrant's scale economics inherent in serving

³² See *Id.* ¶ 335.

³³ See *Id.*

³⁴ See *Id.*

a customer location.

VI. Issues To Be Addressed

After reviewing the pleadings submitted by the parties, the Commission identifies the following issues that must be addressed in the two phases of this docket.

1. For each customer location at which an ILEC asserts that requesting carriers are not impaired without access to DS3 or dark fiber loop transmission facilities due to a self-provisioning trigger, have two or more competing carriers, not affiliated with each other or the ILEC, including intermodal providers of service comparable in quality to that of the ILEC, met the following conditions?
 - a. For DS3 loops, has each competing provider deployed its own DS3 facilities, or deployed DS3 facilities by attaching its own optronics to activate dark fiber transmission facilities obtained under a long-term indefeasible right of use and is serving customers via those facilities?
 - b. For dark fiber, has each competing provider deployed their own dark fiber facilities, including any dark fiber facilities obtain under a long-term indefeasible right of use, but not including any dark fiber purchase on an unbundled basis from the ILEC?
2. For each customer location at which an ILEC asserts that requesting carriers are not impaired without access to DS1 or DS3 loop transmission facilities due to a competitive wholesale facilities trigger, have two or more competing carriers, not affiliated with each other or the ILEC, including intermodal providers of service comparable in quality to that of the ILEC, met the following conditions?
 - a. For DS1 loops, has each competing provider deployed its own DS1 facilities, including dark fiber facilities that the competing provider has obtained on an unbundled, leased, or purchased basis if it has attached its own optronics to activate the fiber? If so, does the competitive provider offer a DS1 loop over its own facilities on a widely available basis to other carriers desiring to serve customers at that location?
 - b. For DS3 loops, has each competing provider deployed its own DS1 facilities, including dark fiber facilities that the competing provider has obtained on an unbundled, leased, or purchased basis if it has attached its own optronics to activate the fiber? If so, does the competitive provider offer a DS3 loop over its own facilities on a widely available basis to other carriers desiring to serve customers at that location?

³⁵ See *Id.*

- c. Does the competing provider have access to the entire customer location, including each individual unit within that location
- 3. Where neither of the triggers identified in Issues 1 and 2 is met for DS3 at a specific customer location, or the trigger identified in Issue 1 is not met for dark fiber at a specific customer location, what facts and circumstances render such a site suitable for further competitive deployment of loop facilities?
 - a. At what specific point does each or a combination of the following factors suggest that a particular location is suitable for further competitive deployment of loops facilities?
 - i. Alternative loop deployment at the location;
 - ii. local engineering costs of building and utilizing transmission facilities;
 - iii. the cost of underground or aerial laying of fiber or copper;
 - iv. the cost of equipment needed for transmission;
 - v. installation and other necessary costs involved in setting up service;
 - vi. local topography such as hills and rivers;
 - vii. availability of reasonable access to rights-of-way;
 - viii. building access restrictions and costs; and
 - ix. availability and feasibility of alternative transmission technologies of similar quality and reliability at the particular location.
 - b. Are there operational barriers at the customer location that make entry uneconomic for competitive providers?
 - i. Are there delays associated with construction of loop transmission facilities that inhibit or are likely to inhibit entry into particular customer locations?
 - ii. Are there delays in building loop transmission facilities associated with gaining building access for multiunit buildings that inhibit or likely to inhibit entry into particular customer locations?
 - iii. Are there delays in building loop transmission facilities associated with gaining permits and right-of-ways from cities or municipalities that inhibit or likely to inhibit entry into particular customer locations?
 - c. Are there economic barriers at any customer location that prevent entry into the enterprise market by competitive providers?
 - i. Considering the most efficient network architecture available, what are the likely

revenues associated with enterprise market loops? The answer to this issue must consider all revenues resulting from voice and data service.

- ii. What are the likely revenue commitments associated with service agreements?
- iii. Considering the most efficient network architecture available, what are the likely costs associated with local exchange mass-market service? The answer to this issue must consider all factors affecting the costs faced by a competitive carrier.
- d. Is a requesting carrier not impaired without access to an unbundled DS3 loops, or an unbundled dark fiber loops, respectively, at such locations?

This list of issues is not intended to be exhaustive. The parties and the ALJ are free to raise and address any issues relevant in this docket that they deem necessary, subject to any limitations imposed by this Order, by the ALJ, or by the Commission in future orders issued in this docket. The Commission reserves the right to identify and provide to the ALJ in the future any additional issues or areas that must be addressed.

VII. Issues Not To Be Addressed

The Commission takes the position that the following issues need not be addressed in this proceeding for the reasons stated.

- 1. A transition plan to migrate the embedded base of unbundled local loop customers to an alternate serving arrangement.**

To the extent the Commission finds no impairment for enterprise loop customers at a particular customer location, the FCC requires mass market carriers to commit to an implementation plan with the appropriate incumbent LEC within two months from the finding of no impairment.³⁶ There is, however, a limited amount of time to address the numerous and diverse issues in this docket within the nine-month time period. The Commission decides that

³⁶ See *Id.* ¶ 532.

this issue can be managed in subsequent proceedings and should be deferred until a later date.


VIII. Effect of Preliminary Order

The Commission's discussion and conclusions in this Order regarding issues that are not to be addressed should be considered dispositive of those matters. Questions, if any, regarding issues that are not to be addressed may be certified to the Commission for clarification if the ALJ determines that such clarification is necessary. As to all other issues, this Order is preliminary in nature and is entered without prejudice to any party expressing views contrary to this Order at hearing. The ALJ, upon his or her own motion or upon the motion of any party, may deviate from the non-dispositive rulings of this Order when circumstances dictate that it is reasonable to do so. Any ruling by the ALJ that deviates from this Order may be appealed to the Commission. The Commission will not address whether this Order should be modified except upon its own motion or the appeal of an ALJ's order. Furthermore, this Order is not subject to motions for rehearing or reconsideration.

SIGNED AT AUSTIN, TEXAS the 16th day of November 2003.

PUBLIC UTILITY COMMISSION OF TEXAS


REBECCA KLEIN, CHAIRMAN


JULIE PARSLEY, COMMISSIONER


PAUL HUDSON, COMMISSIONER